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ABSTRACT

David Brearly was a student of the Enlightenment philosophers and English jurists who taught that a contract existed between the individual and the state, and this exposure influenced him as a framer of the Constitution, with its careful definitions of the obligations of government and the rights of citizens. This booklet on Brearly is one in a series on Revolutionary War soldiers who signed the United States Constitution. It covers his legal training, his military service, and his public service to New Jersey as the state's chief justice and as a delegate to the Constitutional Convention. Personal data on Brearly and suggestions for further readings are also included. (DJC)

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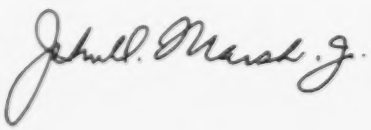
David Brearly

Soldier-Statesmen of the Constitution
A Bicentennial Series 2

Introduction

In September 1987 the United States commemorates the bicentennial of the signing of the Constitution. Twenty-two of the thirty-nine signers of the Constitution were veterans of the Revolutionary War. Their experiences in that conflict made them deeply conscious of the need for a strong central government that would prevail against its enemies, yet one that would safeguard the individual liberties and the republican form of government for which they had fought. Their solution is enshrined in the Constitution. The President of the United States is the Commander in Chief of the nation's military forces. But it is the Congress that has the power to raise and support those forces, and to declare war. The Founding Fathers established for all time the precedent that the military, subordinated to the Congress, would remain the servant of the Republic. That concept is the underpinning of the American military officer. These twenty-two men were patriots and leaders in every sense of the word: they fought the war, they signed the Constitution, and they forged the new government. They all went on to careers of distinguished public service in the new Republic. Their accomplishments should not be forgotten by those who enjoy the fruits of their labors. Nor should we forget the fortieth man whose name appears on the Constitution. The Secretary was the twenty-third Revolutionary veteran in the Convention, who continued his service to the nation as one of its first civil servants.

This pamphlet was prepared by the U.S. Army Center of Military History with the hope that it will provide you with the background of a great American; stimulate you to learn more about him; and help you enjoy and appreciate the bicentennial.



John O. Marsh, Jr.
Secretary of the Army

DAVID BREARLY
New Jersey

David Brearly, who represented New Jersey at the Constitutional Convention, was an important spokesman for the proposition that law has primacy over governments and social institutions. A student of the Enlightenment philosophers and English jurists, he adopted their idea that a contract existed between the individual and the state. He held that the citizen possessed basic rights that had been encapsulated in the Common Law and customs of England, and that neither the will of Parliament nor the immediate needs of local society should take precedence over these fundamental rights. He defended these beliefs on the battlefield during the Revolution and later, as an eminent American jurist, from the bench. Brearly then helped frame the Constitution, with its careful definition of the rights of citizens and the obligations of government, and became one of the first federal judges to serve under this new supreme law of the land.

Brearly's experiences during the Revolution did much to clarify his attitudes toward government. He came to realize in the tumult of the civil war that raged through his home state that without the protection of a strong government the individual citizen's rights would always be hostage to the whims of popular prejudice. A soldier with ties to both militia and regulars, he concluded that only a constitutionally based government could guarantee that the nation's military forces would remain properly subordinated to its elected civilian leaders. From his wartime experience, he also recalled the confusion and chaos that had accompanied a government that was only a weak confederation of the states. A future under such a confederation seemed especially dangerous for small states like New Jersey. He sought a stronger government that would recognize and protect the rights of all the states under a rule of law.

THE PATRIOT

The Brearly family emigrated from Yorkshire in the north of England in 1680, settling in "West Jersey," an area of the colony that looked toward Philadelphia rather than New York for leadership. Brearly grew up near Trenton and attended the College of New Jersey (now Princeton University). He left college before graduating (Princeton would later award its eminent son an honorary degree) to take up the study of the law. He was eventually accepted by the bar and opened a practice in Allentown, a flourishing community at the western end of Monmouth County near Trenton.

Brearly's student years set the course of his subsequent political interests. Princeton's curriculum exposed him to the intellectual ferment of the Enlight-

enment, especially its notions of individual rights, while his legal training required a thorough grounding in treatises on the Common Law. Brearly's studies formed him into a young Patriot, one of Monmouth County's outspoken opponents of Parliamentary absolutism. His biting criticism of the government provoked the ire of Royal Governor William Franklin, who threatened to arrest the popular lawyer for high treason.

Brearly's career took a new turn in the summer of 1776 when New Jersey openly supported the call for independence. His neighbors had elected him to serve as a colonel in the county militia. During this period the Patriots used the militia as the vehicle to implement the decisions of the as yet unofficial government of New Jersey and to prevent opponents from obstructing the move toward independence. Working under the supervision of the local Committee of Safety and the legislature, Brearly recruited, organized, and trained his unit and used it to disarm local Loyalists. Brearly would later come to realize the risks inherent in this kind of extralegal action, but at the time his efforts contributed directly to smoothing the transition to a new state government.

THE SOLDIER

While New Jersey was taking its final steps toward independence, a massive British armada appeared off New York harbor. These forces clearly outnumbered Washington's continentals, and Congress called on nearby states to mobilize their citizen-soldiers to resist the coming assault. Included in New Jersey's 3,300-man quota was Colonel Philip Van Cortlandt's regiment, in which Brearly was second in command. The regiment spent part of its active duty guarding New Jersey's shoreline before transferring to Manhattan for the closing phases of the fight for New York City.

Despite the efforts of Washington's regulars and the massed militia, New York and its strategic harbor fell to the enemy in September 1776. This defeat provided an important lesson that Washington and his senior officers pressed on the Continental Congress: it would take full-time soldiers to engage British and Hessian regiments successfully in open battle. While militia units could play an important role in local defense and flank security, the Continental Army required men who could serve long enough to learn the complex tactics involved in eighteenth century linear warfare. Congress accepted this argument, authorizing a large increase in the Army and directing that it serve for the duration of the war instead of one year at a time.

New Jersey's quota of Continental regiments under the new legislation increased by one, and the state's political and military leaders conferred over the choice of the additional senior officers required to form it. Brearly's militia record attracted their attention, and they commissioned him as lieutenant colo-

Portrait by unknown artist, courtesy of Grand Lodge of the Most Ancient and Honorable Society of Free and Accepted Masons for the State of New Jersey.

nel of the 4th New Jersey Regiment, although resignations and promotions almost immediately led to his transfer to the state's senior unit, the 1st, which had just returned to the state from a year of duty on the Canadian front.

Brearly assisted the regiment's commander, Colonel Matthias Ogden, in reenlisting the men, replacing losses, and reequipping the unit. At the same time, the regiment had to help defend the northern part of the state in the aftermath of the battles of Trenton and Princeton. This latter activity involved constant patrols and frequent skirmishes with British troops based around New Brunswick and Amboy. Beginning in May 1777 the New Jersey Brigade under Brigadier General William Maxwell joined the main army in a series of marches and countermarches across the middle of the state while Washington puzzled over whether Philadelphia or Albany would be the enemy's next target.

General Sir William Howe's Redcoats eventually boarded ships and, sailing by way of Chesapeake Bay, attacked Philadelphia from the rear. Washington hastily redeployed his units to face the new danger, eventually establishing a defensive line along Brandywine Creek. On the morning of 11 September Hessians and some British light troops appeared before Chad's Ford and immediately engaged the New Jersey Brigade. Hard skirmishing lasted all morning as the outnumbered continentals appeared to be holding their own; in the afternoon Howe's main force, which had crossed far upstream at an unguarded ford, appeared on Washington's flank and eventually forced the Americans to retreat. Brearly and the rest of Maxwell's men helped cover the withdrawal

as Philadelphia fell to the enemy. When the Americans counterattacked at Germantown three weeks later, the New Jersey Brigade formed the reserve of one of the two assault columns. The American units were engaged in hard fighting when fog and confusion forced Washington to break off the battle.

Although participating in these two defeats, Brearly's regiment remained highly motivated. During the following winter the men's confidence increased when they were trained by Frederick von Steuben at Valley Forge. In June 1778 the regiment joined in a pursuit of British forces across New Jersey, forming part of the American advance guard and acquitting itself with honor at the battle of Monmouth.

Unable to mass the strength required to take on Washington's full force, the British adopted a new strategy in 1778, concentrating their military effort on the conquest of the southern states. With operations drawing down in the northern theater, and facing a reorganization caused by reduced strength, New Jersey surveyed the senior officers of the state line to determine which were willing to retire. Brearly volunteered, retiring in August 1779 to resume his legal career. In his three years with the militia and continentals, Brearly had gained valuable insights into the political dimension of the age-old issue of civilian control over the military. He remained in touch with military affairs by resuming his old militia command in Monmouth County's 2d Regiment, and later serving as a vice president of the Society of the Cincinnati, the famous veterans' organization.

THE STATESMAN

In the summer of 1779 New Jersey appointed Brearly to succeed Robert Morris as the state's chief justice. Despite his relative youth, he immediately made his mark in American legal history when his court decided the famous case of *Holmes vs. Walton*. The case evolved out of the state's effort to curb contraband trade with the British. Trading with the enemy was popular since the British could buy food and supplies with hard cash or scarce imported items while the American forces most often depended on depreciated paper money or promissory notes. In 1778 New Jersey passed a law that allowed Patriots to seize goods being brought into the state by Loyalists or enemy troops. Suspects were to be tried in a civilian court before juries of six men, instead of the customary twelve dictated by Common Law.

Caught smuggling goods to the British, John Holmes and a companion were duly tried and convicted by a six-man jury. They appealed the conviction to the state Supreme Court, and after lengthy deliberation, Judge Brearly overturned the conviction, declaring the law null and void because it violated the state's Constitution that guaranteed trial by jury under customary English Common Law. For the first time in American history a court asserted the concept

of judicial review, including the right to declare laws passed by a legislature unconstitutional. The decision provoked a public outrage. Although Brearly, a famous veteran, clearly sympathized with the intent of the legislature, he decided in favor of the higher principle involved. His decision was cited in courts in other states and was incorporated into the Constitution of the United States.

In 1787 the New Jersey legislature appointed Brearly to represent the state at the Constitutional Convention in Philadelphia. Although no orator, Brearly quickly won the respect of his fellow delegates for his legal wisdom and his willingness to work for essential compromises. In addition to his labor on the judicial provisions of the new instrument of government, he served as a spokesman for a group that sought to defend the rights of the small states. He also presided over the important Committee on Postponed Matters that developed many of the compromises needed to achieve final agreement. After signing the Constitution, he returned to New Jersey to preside over the state's ratification convention.

Brearly served as a member of the first Electoral College, which chose his old commander, George Washington, President. At the start of his first administration, Washington nominated Brearly as federal district judge for New Jersey, but the noted jurist lived to serve just one year before his death shortly after his forty-fifth birthday.

Brearly was willing to risk his life and reputation in the cause of the rule of law. He donned uniform, first as a citizen-soldier and later as a regular, because he sought to defend fundamental individual rights. This same dedication to the idea of basic rights continued in his later career when as a jurist he took a very unpopular stand so that the citizen's basic freedoms could be preserved, even when they carried short-term costs in efficiency to the state. His dedication to the concept of a supreme law to which all other laws must comply found its most noted expression in the Constitution he helped devise.

The Congress shall have Power . . .
To raise and support Armies . . . ;
To provide and maintain a Navy;
To provide for organizing, arming, and disciplining, the Militia . . . ;

ARTICLE I, Section 8.

Personal Data

BIRTH: 11 June 1745, at Spring Grove, New Jersey*
OCCUPATION: Lawyer
MILITARY SERVICE:
Continental Army—3 years
Highest Rank—Lieutenant Colonel
New Jersey Militia—2 years
Highest Rank—Colonel
PUBLIC SERVICE:
Chief Justice,
New Jersey Supreme Court—10 years
Federal District Judge—2 years
DEATH: 16 August 1790, at Trenton, New Jersey
PLACE OF INTERMENT: St. Michael's Episcopal Church Cemetery, Trenton, New Jersey

* In 1752 the English-speaking world adopted the Gregorian calendar, thereby adding 11 days to the date. Thus Brearly's date of birth was recorded in 1745 as 30 May.

Further Readings

No full-length biography of David Brearly exists, but details of his life can be found in the following sources: American Historical Society, *Cyclopedia of New Jersey Biography* (3 vols., 1916); William Brearley, *Genealogical Chart of the Brearley (sic) Family* (1886); Andrew McLaughlin, *The Courts, the Constitution, and Parties* (1912); Hamilton Schuyler, *History of St. Michael's Church, Trenton* (1926); and Austin Scott, "Holmes vs. Walton: The New Jersey Precedent," *American Historical Review,* 4 (1899): 456–69. Information on his military career is contained in William Stryker's *Official Register of the Officers and Men of New Jersey in the Revolutionary War* (1872) and *General Maxwell's Brigade of the New Jersey Continental Line* (1885). Other books which shed light on the creation of the Constitution and the role of the military in the early history of the nation include Sol Bloom, *The Story of the Constitution* (1937); Don Higginbotham, *The War of American Independence* (1971); Merrill Jensen, *Making of the Constitution* (1979); Richard Kohn, *Eagle and Sword* (1975); Clinton Rossiter, *1787: The Grand Convention* (1966); Gordon Wood, *The Creation of the American Republic* (1969); and Robert K. Wright, Jr., *The Continental Army* (1983).

Cover: *Scene of the Signing of the Constitution of the United States,* by Howard Chandler Christy, courtesy of the Architect of the Capitol.